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SWITCH, LTD.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SWITCH, LTD. a Nevada limited liability
company,

Plaintiff,

vs.

STEPHEN FAIRFAX; MTECHNOLOGY; and
DOES 1 through 10; ROE ENTITIES 11
through 20, inclusive,

Defendants.

Case No.: 2:17-cv-2651

**MOTION FOR PRELIMINARY
INJUNCTION**

Pursuant to FRCP 65, Plaintiff Switch, Ltd., a Nevada limited liability company (“Switch”) hereby submits this Motion for Preliminary Injunction (the “Motion”) to stop the hemorrhaging of Defendants’ ongoing misappropriation of trade secrets and breaches of contract, hereby requesting the following:

(1) a preliminary injunction requiring Defendants to cease and desist all design of any data center;

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1 (2) a preliminary injunction requiring Defendants to remove all promotional materials
2 on MTechnology.net, and any other social media account, or webpage over which Defendant
3 exercises any control (e.g. YouTube) regarding their design efforts for Aligned Data Centers
4 (“Aligned”); and

5 (3) an order granting the immediate delivery to Switch of all documents, contracts and
6 emails exchanged between Defendants and Aligned.

7 This Motion is being reasserted as a result of the removal of this action from the Nevada
8 Eighth District Court, where the court granted this Motion before learning that the case, days
9 earlier, had been removed.¹

10 This Motion is made pursuant to FRCP 65 with the following Memorandum of Points
11 and Authorities, the supporting exhibits attached hereto, the papers and pleadings on file
12 herein, and any oral argument that this Court may allow.

13 Dated this 31st day of October, 2017.

14 **WEIDE & MILLER, LTD.**

15
16 By: /s/ F. Christopher Austin
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20 *Attorneys for Plaintiff SWITCH, LTD.*
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¹ See Court Minutes, Case A-17-761382-C, Switch v. Fairfax (Oct. 19, 2017), granting Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND STATEMENT OF GOOD CAUSE

This Motion is brought under Switch’s claims for breach of contract, violation of the Defend Trade Secrets Act of 2016, and Misappropriation of Trade Secrets under N.R.S. 600A. Defendants publicly promote Switch’s confidential and trade secret information for the benefit of Defendants and Aligned Data Centers in spite of Defendants signing strict non-disclosure agreements (“NDAs”) with Switch. Namely, Defendant Fairfax *personally* promotes his blank page stage² involvement in designing Aligned Data Center (“Aligned”) technology in videos and blog posts. Mr. Fairfax did this *after* assuring Switch, verbally and in writing, that he would never compete or design a data center.

Switch, in reliance on Mr. Fairfax’s promise and the NDAs, disclosed the highly confidential and trade secret protected information Mr. Fairfax requested, and gave Mr. Fairfax a uniquely in-depth tour of Switch’s facilities so that he might better understand the import of such highly confidential disclosures. But for Mr. Fairfax’s promise that he would never design a data center, Switch would not have made the requested disclosures. After signing strict NDAs and then thoroughly and repeatedly inspected Switch’s facilities, Fairfax designed the Aligned facilities in breach of his confidentiality agreements with Switch.

Switch’s has *already* been tortiously impacted by Defendants unlawful actions and Switch will continue to be damaged unless this Motion is granted. Defendants’ actions have irreparably harmed Switch. Fairfax’s unlawful and ongoing disclosure of Switch’s trade secrets destroys the value of such trade secrets, rendering the technological innovations taught by them commonplace and damaging Switch’s reputation as an innovator solely in possession of cutting edge technology. As such damage is *per se* incapable of being remedied by any monetary sum, it is irreparable under the law.

² See **Exhibit 1** which includes screen shots of the videos at issue where Fairfax admits, publicly and in his own words, that he was integral in the design of the Aligned Facilities.

1 In addition, because of Defendants unlawful actions, Switch has already lost contracts.
 2 Switch is currently negotiating a contract with a customer who is entertaining offers from
 3 Aligned. Unless this Motion is granted, Defendants and Defendants' clients, Aligned, will
 4 continue to promote Switch's technology as their own and unlawfully force Switch to compete
 5 against its own technology, further irreparably harming Switch.

6 Switch brought this Motion on an *ex parte* basis in state court because Defendants
 7 appeared to be avoiding service, as the server reported that individuals at Defendants place of
 8 business reported they were neither officers nor authorized to accept service. Switch has
 9 subsequently learned that service has been effectuated and, therefore, brings this Motion with
 10 notice.

11 Switch has separately filed an action against Aligned Data Centers for patent
 12 infringement and related claims in the Eastern District of Texas; however, given recent U.S.
 13 Supreme Court and U.S. Circuit Court decisions regarding venue, it appears unlikely that
 14 Switch could seek the relief requested in this action against Fairfax in Texas. Thus, this action
 15 and this Motion have been brought in Nevada. *Id.*

16 17 **II. STATEMENT OF FACTS**

18 **A. Switch Has Unique Data Center Technologies and Trade Secrets.**

19 Data centers are the heart of the internet. As technology has become increasingly
 20 integral to our daily lives, the need for data centers (particularly, efficient and reliable data
 21 centers) has increased, exponentially. Central to Switch's innovative technologies are Rob
 22 Roy's designs. Switch's novel technology and trade secrets has allowed Switch to build and
 23 operate their data centers dramatically more cost efficiently than their competitors. Because
 24 of these technologies, various groups have applauded Switch's data centers as superior to those
 25 built by Apple, Google, Facebook, Amazon, Microsoft, and other technology giants.³

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27
28 ³ See <http://www.greenpeace.org/international/en/publications/Campaign-reports/Climate-Reports/clicking-clean-2017/>. See also <http://datacenterfrontier.com/top-10-cloud-campus/>.

1 Switch is a Nevada limited liability company organized and existing under the laws of
2 the State of Nevada. Switch is a Las Vegas-based company that designs, constructs, and
3 operates the world's most powerful telecommunication offerings, data centers and service
4 technology ecosystems. Switch's facilities sustainably power, cool, and protect the physical
5 infrastructure and networks necessary to run the Internet.

6 In addition to being well-known for its innovative technologies and confidential
7 approach to its services, Switch is also recognized for providing military grade physical
8 security to protect its customers and Switch's intellectual property. Visitors to Switch's
9 facilities must first sign non-disclosure agreements and agree to comply with Switch's security
10 protocols. This high degree of physical security and constant presence of security personnel
11 allows Switch to limit access to its trade secrets, patent-pending technologies, confidential
12 designs and protocols, and to preserve the integrity of its mission critical operations that power
13 the Internet.

14 **B. Stephen Fairfax Has Publicly Admitted to Designing Aligned's Facilities.**

15 On or about May 2011 and again on August 2015, Switch permitted Stephen Fairfax to
16 conduct and in-depth investigation of Switch's facilities. Switch gave Fairfax special access
17 to Switch's confidential and trade secret information to conduct a thorough audit and
18 assessment of Switch's technologies for the benefit of a Switch customer. Like all other
19 visitors to Switch facilities, Mr. Fairfax signed strict nondisclosure agreements in which he
20 committed not to disclose or use any of Switch's confidential information. As a necessary
21 precondition to disclosure of highly confidential information, Mr. Fairfax also confirmed
22 verbally and in writing, that he would never build a data center.

23 Unbeknownst to Switch, Fairfax was hired in 2013 by Aligned, a provider of new data
24 centers in Arizona and Phoenix, at or around the same time he reassured Switch he had "no
25 interest in building and operating data centers." Roughly twelve (12) months thereafter,
26 Fairfax personally and publicly started promoting his integral involvement in designing
27 Aligned's facilities "while the paper was literally still blank."⁴ A simple side-by-side

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⁴ (<https://www.aligneddatacenters.com/video/steve-fairfax-mtechnology-aligned-data-centers> at 1:09).

comparison of Aligned’s technology versus Switch’s technology reveals the facial similarities. The obvious duplication is not happenstance⁵:

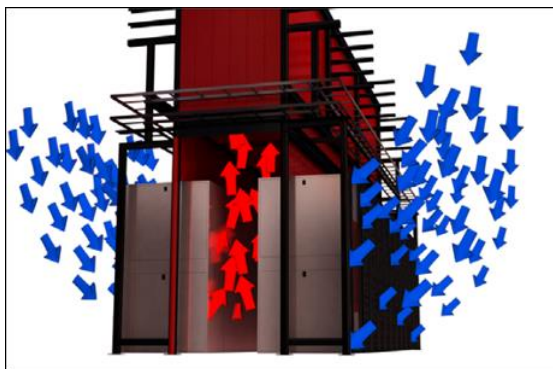
Switch T-SCIF
Side View



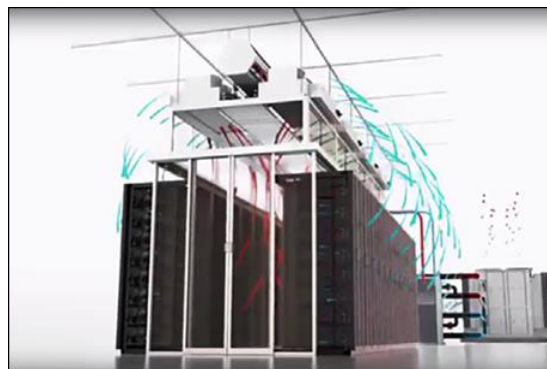
Aligned “Customer Pod”
Side View



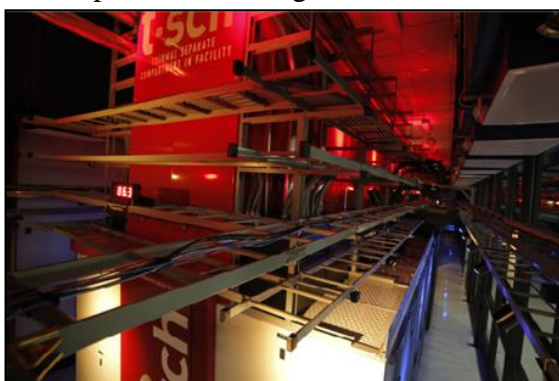
Switch T-SCIF
Front View



Aligned “Customer Pod”
Front View



Switch T-SCIF
Top View Showing the Heat Shield



Aligned “Customer Pod”
Top View Showing the Heat Shield



⁵ The Aligned images are from www.aligneddatacenters.com, last visited on 10/01/17. The red labeling on the last four images titled “Aligned Data Center - Cross-Section of Entire Facility” is provided for clarity.

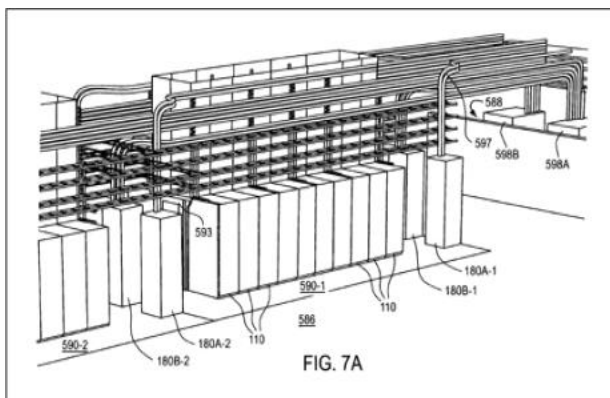
Switch T-SCIF
Side View



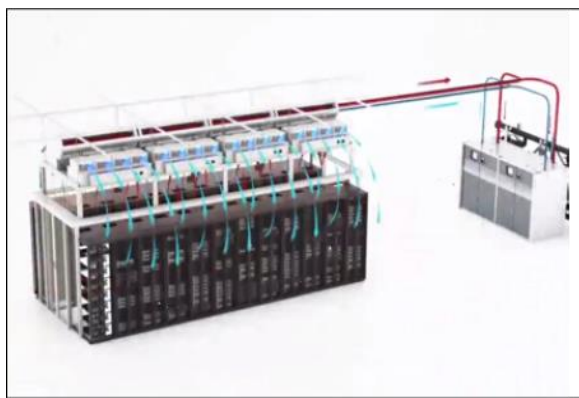
Aligned "Customer Pod"
Side View



Switch T-SCIF
Diagram



Aligned "Customer Pod"
Diagram



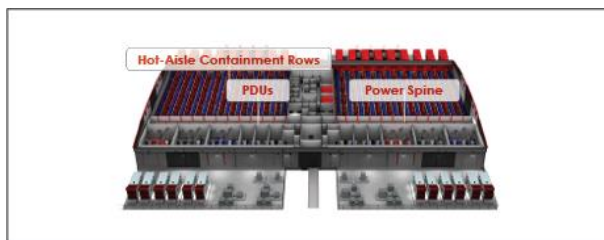
Switch Data Center
Cross-Section of Entire Facility



Aligned Data Center
Cross-Section of Entire Facility



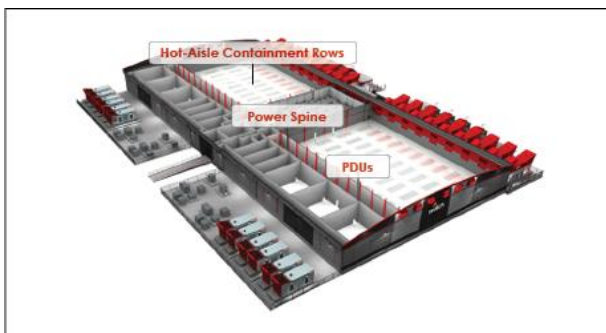
Switch Data Center
Cross-Section of Entire Facility



Aligned Data Center
Cross-Section of Entire Facility



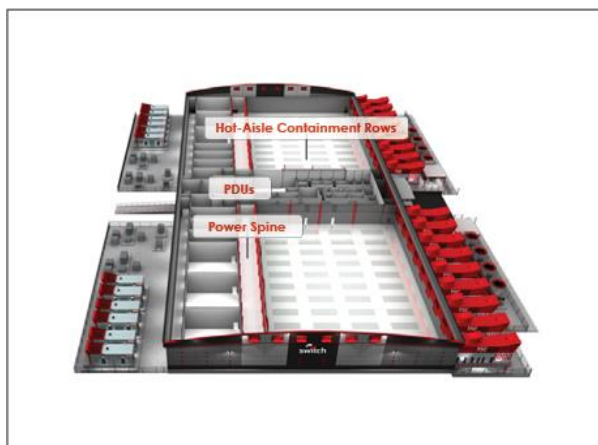
Switch Data Center
Cross-Sections of Entire Facility



Aligned Data Center
Cross-Sections of Entire Facility



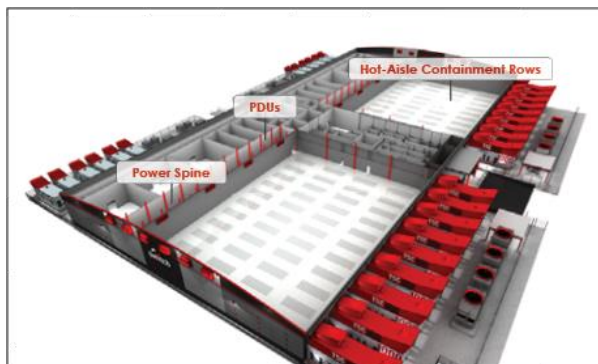
Switch Data Center
Cross-Section of Entire Facility



Aligned Data Center
Cross-Section of Entire Facility



Switch Data Center
Cross-Section of Entire Facility



Aligned Data Center
Cross-Section of Entire Facility



The mimickery is painfully obvious. Current and potential customers have continued to comment to Switch that Aligned's facilities look just like Switch's. Declaration of Anne-Marie Birk at ¶6.

1 III. ARGUMENT

2 To obtain a preliminary injunction in Nevada, the following must be considered:

3 1. A party must demonstrate that it has a reasonable probability of success on the
4 merits of its underlying claims;

5 2. Without injunctive relief, plaintiff will suffer irreparable harm for which
6 compensatory damages are inadequate;

7 3. The court may weigh the public's interest in seeing the harm stopped, as well
8 as the relative hardships of the parties should the court take or refuse to take action; and

9 4. The purpose of the restraining order/injunction is to preserve the status quo, or
10 to "preserve a business or property interest." *Winter v. Natural Resources Defense Council,*
11 *Inc.*, 555 U.S. 7, 20 (2008) (reasserting traditional four- factor test: (i) likely to succeed on the
12 merits, (ii) likely to suffer irreparable harm, (iii) the balance of equities favor moving party,
13 and (iv) an injunction is in the public interest); *Guion v. Terra Mktg. of Nev., Inc.*, 90 Nev. 237,
14 240 (1974).

15 5. A Bond as required by FRCP 65(c), to the extent required by the Court.

16 Switch is entitled to a preliminary injunction and temporary restraining order for the
17 following reasons:

18 A. Switch is likely to succeed on the merits of the relevant claims.

19 To obtain injunctive relief, a party must demonstrate that it will likely succeed on the
20 merits of its underlying relevant claims. *Winter*, at 20. Here, it is likely that Switch will
21 succeed on the merits of the case because the Defendant has personally and publicly admitted
22 to breaching his contracts with Switch. As explained above, Stephen Fairfax and
23 MTechnology were retained by a Switch client and permitted, subject to a stringent Non-
24 Disclosure Agreement to view Switch's trade secret information. After assuring Switch *in*
25 *writing* that he had no interest in building data centers, Switch permitted Fairfax to return a
26 second time to inspect Switch's trade secrets.
27
28

Despite Defendants' contractual commitments and repeated verbal assurances regarding those commitments, Mr. Fairfax then touts his doing the very thing he assured Switch he would not do: he designed a competing facility. A comparison between Switch facilities and Aligned facilities reveal uncanny likeness. Aligned even named the electrical cabling of its facility a "power spline" in blatant imitation of Switch's "power spine."⁶ Except for superficial differences, the facilities and the technology appear identical. These striking similarities are not the result of coincidence but rather demonstrate clearly that Stephen Fairfax and MTechnology misappropriated confidential and trade secret information in the design of Aligned Data Centers. Given the obvious misappropriation coupled with Stephen Fairfax's admission that he participated in the design from the "blank page" stage, it is likely that Switch will prevail on the merits of its misappropriation of trade secrets claim and related claims, satisfying the first factor for the imposition of injunctive relief.

B. Without injunctive relief, Switch will suffer irreparable harm for which compensatory damages are inadequate.

In order for an injunction to be granted, a party must show irreparable harm. *Winter* at 20-24. Here, the misappropriation of trade secrets has and continues to cause irreparable harm to Switch. In addition to monetary damages,⁷ Switch's reputation and good will are being undermined. As discussed above, Switch's trade secrets give it a competitive edge in the market, set it apart from its competitors, and uniquely identify it as at the cutting edge in data center innovation only to the degree such trade secrets are not generally known. Thus, the value of Switch's trade secrets is inexorably connected to its reputation and good will, neither of which can be reduced to a dollar amount or calculated as a monetary damage. Customers, both potential and actual, have commented to Switch that the facilities look just like each other. The harm is irreparable.

⁶ See <http://www.datacenterknowledge.com/archives/2015/10/19/modular-cooling-system-enables-demand-data-center-capacity> (where Aligned promotes its "spline" in the center section of the facility).

⁷ Switch has already lost contracts with at least one very large potential client and at this time a multimillion-dollar potential client is deciding whether to contract with Switch or Aligned. There would have been no loss, no injury to Switch, but for Fairfax's breach of his agreement.

Pursuant to both state and federal law, Fairfax has caused Switch irreparable harm. Irreparable harm is presumed in situations where a confidentiality agreement or restrictive covenant has been breached or trade secrets have been misappropriated. *See EchoMail, Inc. v. Am. Express Co.*, 378 F. Supp. 2d 1, 4 (D. Mass. 2005); *Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc.*, 2004 WL 1497688 (D. Mass. 2004); *FMC Corp v. Taiwan Tainan Giant Indus. Co., Ltd.*, 730 F.2d 61, 63 (2nd Cir. 1984) (trade secrets, once lost, are lost forever; such loss cannot be measured in money damages); *Ivy Mar Co. v. C.R. Seasons, Ltd.*, 907 F. Supp. 547, 566 (E.D.N.Y. 1995); *Computer Assoc. Int'l, Inc. v. Bryan*, 784 F. Supp. 982, 986 (E.D. N.Y. 1992); *Refractory Technology, Inc. v. Koski*, 1990 WL 119560, at *3 (N.D. Ill. 1990) (loss of trade secret would cause plaintiff immediate, irreparable harm); *ISC-Bunker Ramo Corp. V. Altech, Inc.*, 765 F. Supp. 1310, 1338 (N.D. Ill. 1990) ("it is often difficult to [d]etermine the monetary damages suffered thereby"); *CPG Prods. Corp. v. Mego Corp.*, 214 U.S.P.Q. 206, 214-15 (S.D. Ohio 1981) (the threat of disclosure, destruction, or dilution of trade secret constitutes irreparable injury justifying injunctive relief); *Donald McElroy, Inc. v. Delany*, 389 N.E.2d 1300, 1308 (1st Dist. 1979) (Once a protectable interest has been established, injury to plaintiff will presumably follow if that interest is not protected; threat of irreparable harm sufficient where former employee violated the terms of a non-disclosure agreement and was about to use confidential information against the plaintiff, irreparable injury was shown and preliminary injunction was properly granted).

Fairfax's unlawful and ongoing disclosure of Switch's trade secrets destroys the value of such trade secrets, rendering the technological innovations taught by them commonplace and damaging Switch's reputation as an innovator solely in possession of cutting edge technology. As such damage is *per se* incapable of being remedied by any monetary sum, it is irreparable under the law.

Switch has built its reputation as a leader in the data colocation industry. This reputation is built on the technology and trade secrets developed by Rob Roy. Now this technology is being misappropriated by Stephen Fairfax and MTechnology in the design and development of Switch competitors. Because Fairfax's unlawful disclosure of Switch's

1 confidential information and trade secrets has and is presently causing irreparable harm to
2 Switch, a preliminary injunction is proper and warranted under the law.

3 **C. The public interest and the relative hardships all weigh in favor of Switch.**

4 The public has an interest in preserving trade secret and confidential information. The
5 preservation of confidential and trade secret protects small and large business alike. Without
6 a recourse in the event of misappropriation, business owners would be unprotected and lose
7 any the ability to compete. Switch provides employment for hundreds of individuals in the
8 Las Vegas metropolitan area. Switch has taken all possible measures to protect its trade secret
9 information, including requiring anyone entering any Switch facility to sign non-disclosure
10 agreements and shielding its trade secrets from public view. Allowing Fairfax to continue to
11 disclose Switch's misappropriated trade secrets and confidential information damages the
12 public's interest in protecting such information and encouraging innovation. Absent robust
13 preliminary enforcement of such trade secrets and confidential information, such trade secrets
14 and confidentiality would be lost forever. Even should a party prevail at trial, the harm would
15 already have been done. The party would have lost the competitive edge the public intends for
16 such confidential information and trade secrets to provide. The public interest therefore favors
17 preserving confidential information and trade secrets generally and in the present action by
18 enjoining misappropriation and continuing disclosure of such confidential information and
19 trade secrets.

20 Here, the relative hardships all weigh in favor of Switch because, as discussed,
21 irreparable harm has occurred and will continue to occur if Switch's trade secrets continue to
22 be misappropriated and disclosed by Stephen Fairfax and MTechnology. There is no harm to
23 Fairfax and MTechnology because they insisted they were not in the business of designing data
24 centers. Thus, Defendants will not be harmed by requiring Defendants to honor their promise
25 not to be in the business of designing or auditing business.

26 Accordingly, there is no harm to Defendants. In 2011, and again as late as May of
27 2013, Mr. Fairfax himself noted that he had no interest in building or operating data centers.
28 Prior to learning Switch's confidential information and trade secrets, no part of Defendants'

1 business involved the designing or building of data centers. In fact, according to
2 MTechnology's own webpage, MTechnology is focused on "applying the science of
3 Probabilistic Risk Assessment..."⁸ No reference is made to the design and/or construction of
4 data centers. Only after Defendants obtained Switch's confidential information and trade
5 secrets did Fairfax and MTechnology commence such a business and they did so by unlawfully
6 misappropriating and using Switch's confidential information and trade secrets in direct
7 violation of the promises, covenants and agreements Defendants had made not to do those very
8 things.

9 The *status quo ante* that the injunction requests, therefore, is a return to the status of
10 Defendants prior to their violations, misappropriations and unlawful disclosures. Because this
11 Motion properly seeks to restore the parties only to their respective positions prior to the
12 complained of departures from that *status quo* by Defendants, this Motion, on balance, imposes
13 little or no hardship on Defendants. It leaves them in the position they were in prior to their
14 wrongful conduct, harming them not at all. It does not prohibit either Defendant from engaging
15 in the businesses they were engaged in prior to their sanctionable conduct; nor does it prevent
16 Defendants from obtaining an income or profits from any prior-established lawful pursuits. It
17 merely enjoins them from continuing to harm Switch by their recent, unlawful actions. To do
18 this, Switch respectfully request the Court enjoin Stephen Fairfax and MTechnology from
19 continuing to design data center facilities and require them to remove any videos, blogs, or
20 promotional materials involving Fairfax and his design involvement with Aligned Data
21 Centers. While such an injunction would have little or no impact on their Defendants' lawful
22 and existing business, *status quo ante*, the absence of such an injunction—as discussed *infra*—
23 would result in the permanent, irreparable loss of Switch's trade secrets, confidential
24 information, and the intangible good will and reputation Switch has built upon such intellectual
25 property assets. Clearly the balancing of harms favors Switch, and a preliminary injunction is
26 warranted.

27 / / /

28 _____
⁸ http://www.mtechnology.net/about_us.htm

D. This Court should only require nominal security.

As explained above, it is anticipated that Defendants will suffer no financial consequences should the Court enter the requested preliminary injunction. Moreover, by Defendant's own admission, he has done what he promised Switch he would not do, design data centers. Therefore, a bond is unnecessary. However, in the event that the Court requires that a bond or other security be posted by Switch, Switch requests that the Court set an amount that is no greater than \$1,000.00.

IV. CONCLUSION

Fairfax did something he contractually promised he would not do; he used Switch's trade secrets to design a competing facility, and then promoted that unlawful activity. Based upon the foregoing, Switch has shown it meets the standard for injunctive relief. Switch has demonstrated it is likely to succeed on the merits, it will suffer irreparable harm if an injunction does not issue, the balance of hardships tips in its favor, and an injunction is in the public's best interest. Therefore, Switch respectfully asks this Court to grant this Motion for a Preliminary Injunction pending adjudication of this matter on the merits.

Dated this 31st day of October, 2017.

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9 *Attorneys for Plaintiff*
10 **SWITCH, LTD.**

11 **UNITED STATES DISTRICT COURT**

12 **DISTRICT OF NEVADA**

13 SWITCH, LTD. a Nevada limited liability
company,

Case No.: 2:17-CV-2651

14 Plaintiff,

15 vs.

16
17 STEPHEN FAIRFAX; MTECHNOLOGY; and
DOES 1 through 10; ROE ENTITIES 11
18 through 20, inclusive,

19 Defendants.
20

21 **DECLARATION OF ANNE-MARIE BIRK IN SUPPORT OF PLAINTIFF'S**
22 **MOTION FOR PRELIMINARY INJUNCTION**

23 I, Anne-Marie Birk, declare under penalty of perjury under the laws of the United States
24 as follows:

25 1. The undersigned, being warned that willful or false statements and the like, are
26 punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false
27 statements and the like may jeopardize the validity of the application or document or any
28 registration resulting therefrom, declares that all statements made of his own knowledge are

1 true; and all statements made on information and belief are believed to be true.

2 2. This declaration is submitted in support of Switch Ltd.'s Motion for Preliminary
3 Injunction.

4 3. I am Associate General Counsel for Switch, Ltd. and have acted in that capacity
5 since May of 2017.

6 4. Switch is a Nevada limited liability company organized and existing under the
7 laws of the State of Nevada.

8 5. Applicant is a Las Vegas-based company that designs, constructs, and operates
9 the world's most powerful data centers and technology ecosystems.

10 6. I am informed, believe, and have reviewed documents showing current and
11 potential customers—who having viewed the data centers of Switch and Aligned—have
12 commented that Aligned's later constructed data center look just like Switch's.

13 7. Through the Constable in Massachusetts, Switch attempted to effectuate service
14 starting September 12, 2017. Even though the summons and complaint were left with
15 employees at Defendants' place of business, the Constable reported that service was not
16 effectuated as the employees stated they were not officers or agents of Defendants and not
17 authorized to accept service.

18 8. The parties were simultaneously involved in parallel litigation for patent
19 infringement in Texas. In the course of that patent infringement litigation, counsel for the
20 parties have discussed this pending matter and the service issues related to it.

21 9. Switch emailed a copy of the complaint to counsel for Defendants and requested
22 that Counsel for Defendants accept service on behalf of their client. However, Defense Counsel
23 refused to accept service.

24 10. Based on those fact, Switch was of the impression that Defendants were evading
25 service, so Switch originally filed this as an Ex Parte Motion for a Preliminary Injunction in
26 State Court.

27 ///

28 ///

Exhibit 1



Mr. Fairfax explains that Aligned retained him to assist in the design of their data center “while the paper was literally still blank”. See <https://www.aligneddatacenters.com/video/steve-fairfax-mtechnology-aligned-data-centers> at 1:11. See also https://www.youtube.com/watch?v=KZRwktOCvdo&list=PLQ-RIHgVtTDInqq_HLtYGWz-jr3Se1xfg.



Mr. Fairfax also emphasizes that Aligned “told us their reliability target ... and gave us a seat at the table to participate in the design process in order to ensure that they achieved that goal.” See <https://www.aligneddatacenters.com/video/steve-fairfax-mtechnology-aligned-data-centers> at 1:26. See also https://www.youtube.com/watch?v=KZRwktOCvdo&list=PLQ-RIHgVtTDInqq_HLtYGWz-jr3Se1xfg.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of WEIDE & MILLER, LTD. and that on October 31, 2017, I served a full, true and correct copy of the foregoing **MOTION FOR PRELIMINARY INJUNCTION** via CM-ECF to the addressees listed below:

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